IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of VICKI LYNN BALASHOV, Respondent, and DIMITRI MIKHAILOVICH BALASHOV, Appellant.	)	No. 62378-8-I DIVISION ONE UNPUBLISHED OPINION FILED: February 1, 2010

BECKER, J.—In this appeal, Dimitri Balashov challenges a parenting plan. The plan allows his two children to reside with him for a year in order to finish the coming school year, but it provides that they will reside primarily with their mother thereafter. We conclude that structuring the plan in this manner was within the court's discretion. Except for one provision that gives the mother sole decision-making authority in the area of religious upbringing, we affirm the parenting plan.

Dimitri and Vicki Balashov married in 1996. Early in the marriage, the Balashovs lived briefly in Russia near Dimitri's mother. Their first child, a daughter, was born there in 1997. They moved back to the United States in 1998 and settled in Bremerton where their son was born the next year. The

Balashovs moved to Bainbridge Island in 2005. Dimitri's mother, a retired physician, stayed with the Balashovs for extended periods of time and has helped to care for the two children. Vicki was a stay-at-home parent for four years when the children were very young. She then became the primary wage earner in the family and remained so up to the time of trial.

Vicki and Dimitri discussed separating for some time, but concealed their discussions from the children until October 2006, when Vicki moved out of the house and into a nearby apartment. She and Dimitri worked out a pattern of sharing custody on a week-on, week-off basis. In June 2007, Vicki moved to an apartment in Mukilteo and filed for divorce. At the time of trial, she was engaged to marry in the near future. Dimitri was still living on Bainbridge, and the children were living with him according to the terms of an interim parenting plan.

The permanent parenting plan devised by the trial court after a six day trial in August 2008 had three phases. For the coming school year, the children would continue to reside with Dimitri for the majority of the time. They would stay with Vicki for the first and third weekend of each month and for one full day on the fourth weekend. This arrangement was designed to allow them to complete the final grades at their respective schools and counseling in familiar surroundings on Bainbridge. Once the school year ended in June 2009, phase 2 would begin and the schedule would be reversed. The children would reside with Vicki for the majority of the time and attend schools in Mukilteo. They would

stay with Dimitri on the first, third, and fourth weekends. A possible third phase would begin in the event that Dimitri moved nearer to Mukilteo, in which case the residential schedule would be divided on a 50-50 basis as negotiated by the parents or as determined by the court.

Dimitri attacks several findings entered in support of the parenting plan. He also appeals the phased nature of the plan, contending that it impermissibly allows for an "automatic modification" of the children's primary residence. We review a trial court's final parenting plan for an abuse of discretion. In re Marriage of Cabalquinto, 100 Wn.2d 325, 327, 669 P.2d 886 (1983). Unchallenged findings are verities on appeal. In re Marriage of Brewer, 137 Wn.2d 756, 766, 976 P.2d 102 (1999).

DESIGNATION OF PRIMARY CARETAKER

At trial, both parties asked to be designated as the primary residential caretaker for the two children. Each sought negative findings against the other on the basis of past behavior. At the same time, both of them proposed parenting plans that offered liberal residential time to the other parent.

Dimitri's central argument is that the children were doing well residing with him on Bainbridge and the trial court engaged in unsupported speculation that it would be in their best interest to make the transition to Vicki's household after one year.

In entering a permanent parenting plan, a court is not to draw any

presumptions from the provisions of the temporary parenting plan. RCW 26.09.191. A trial court's decision regarding residential placement must be made with the best interests of the child in mind after considering the factors found in RCW 26.09.187(3). Residential continuity is not mandatory. Of the factors listed in the statute, most weight is to be given to the first one: "The relative strength, nature, and stability of the child's relationship with each parent." RCW 26.09.187(3)(i). Another statutory factor relevant here is: "Each parent's past and potential for future performance of parenting functions . . . including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child." RCW 26.09.187(3)(iii).

In support of the decision to designate Vicki as the parent with whom the children would primarily reside after the first year, the court entered detailed and unchallenged findings emphasizing that she was their primary residential caretaker before she and Dimitri separated, even though Dimitri was the "stay-at-home parent" for three of those years. The court found that Dimitri played the role of a stern disciplinarian and authority figure. The court found that his relationship to Vicki had been dysfunctional and controlling to the point that she "yielded all authority and control of family affairs to him without challenge." Vicki was submissive to Dimitri throughout the marriage. The role she assumed in the family was "to nurture the children, to enhance and enrich their lives with cultural

and social experiences and activities, and to develop a sense of independence and self-worth in the children." Parenting Plan 3.12.2(a), "Designation of Custodian."

The court found that Dimitri's parenting style improved considerably during the year between separation and trial when he was the primary caretaker. But the court also found that Dimitri continued to be bent on punishing Vicki for exercising independent judgment and moving out of the home without his consent. The court did not want to designate Dimitri as the primary caretaker on a long term basis because he was too entrenched in the concept that he should be the ultimate decisionmaker on all matters affecting his family. Parenting Plan 3.12. These unchallenged determinations are within the trial court's discretion when applying the statutory factors. We find no error in the designation of Vicki as the parent with whom the children will reside the majority of the time.

ABUSIVE USE OF CONFLICT

Dimitri does challenge the trial court's determination that he engaged in the abusive use of conflict towards Vicki in front of the children. This finding is set forth in the section of the plan labeled "Basis for Restrictions."

II. Basis for Restrictions

Under certain circumstances, as outlined below, the court may limit or prohibit a parent's contact with the children and the right to make decisions for the children.

2.1 Parental Conduct (RCW 26.09.191(1), (2))

Does not apply.

2.2 Other Factors (RCW 26.09.191(3))

The father's involvement or conduct may have an adverse effect on the children's best interests because of the existence of the factors which follow:

The abusive use of conflict by the father towards the mother, in front of the children, which creates the danger of serious damage to the children's psychological development. Specifically, and without limitation, (1) the father's chronic role-modeling during the marriage emotionally dominated the mother and gave her little respect as a co-equal member of the family and as a parent, and (2) the father has refused to negotiate fairly and openly with the mother regarding visitations that were not explicitly spelled out in the temporary parenting plan.

In order to restrict a parent's role in a parenting plan on the basis of "abusive use of conflict," the trial court must find that the use of conflict by the restricted parent creates a danger of serious damage to the children's psychological development. RCW 26.09.191(3)(e); In re Marriage of Burrill, 113 Wn. App. 863, 871, 56 P.3d 993 (2002), review denied, 149 Wn.2d 1007 (2003). Dimitri says there is no evidence that his tendency to be controlling impacted anyone except Vicki. But the evidence necessary to support the finding is evidence of a danger of psychological damage, not that actual damage has already occurred. Burrill, 113 Wn. App. at 872. The evidence that Dimitri was bringing conflict to visitation exchanges was sufficient to support the court's determination that his use of conflict could affect the children.

Dimitri further argues that the court's decision to leave the children in his

care for a year shows that his parenting style does not pose a danger of serious damage. It was inconsistent and unreasonable, he contends, for the court to rely on its finding of an abusive use of conflict as a basis for designating Vicki as the primary residential caretaker at the end of the year.

This argument fails because the court did not utilize its finding about Dimitri's abusive use of conflict as the basis for designating Vicki as the primary caretaker. It is true that in the section of the plan designating Vicki as the primary caretaker, the court expressed concern about what Vicki described as an "endless dispute" over petty visitation issues. The court noted a previous finding by a court commissioner that Dimitri acted in bad faith when he tried to keep the children from visiting with Vicki and her parents for a preplanned vacation during spring break from school. Parenting Plan 3.12.9. The court referred to Dimitri's former authoritarian parenting style and "his continuing conflicted relationship with the mother." The court stated that these factors "impact on his suitability as a primary residential caretaker for the children." Parenting Plan 3.12.6. But in this section of the parenting plan, there is no direct reference to the finding of "abusive use of conflict." For this reason, we are not persuaded that the court intended to use that finding as a basis for refusing Dimitri's request to be the primary caretaker or otherwise limiting his time with the children. In fact, the parenting plan allows Dimitri a generous amount of time with the children and contemplates that it could rise to a 50-50 time split if he

lived closer to the Mukilteo School District.

The court did directly refer to the finding of Dimitri's "abusive use of conflict" in other sections of the plan. For example, the finding is the basis for such restrictions as limiting Dimitri to calling the children once per day while they are in Vicki's care and providing that he is to communicate with Vicki only by e-mail except in an emergency. Parenting Plan 3.10.

Significantly, the court also relied on it as the underpinning for the provisions about decision-making authority. The court recognized that a finding of abusive use of conflict *may* be used as a basis for granting sole decision-making authority to one parent. RCW 26.09.187(b)(i) and (c)(i). But the court expressly refused to limit Dimitri's decision-making authority (except with respect to decisions about religion, discussed below) because the court expected that with the aid of counseling, Dimitri would learn to be more compromising, flexible, and fair. "There is a limiting factor in paragraph 2.2, but there are no restrictions on mutual decision making for the following reasons: The parties will engage in coparenting therapy to assist them in making joint decisions." Parenting Plan 4.3. The court ordered coparenting therapy to start immediately.

The plan provides that if the coparenting therapy was unsuccessful or was deemed unworkable after a year, Vicki would be allowed to seek "additional authority and protection" as the primary residential parent. The court explained that this permission was being extended to Vicki, but not to Dimitri, because

there was "no evidence that the mother would intentionally frustrate the co-parenting process. She has been the parent who has tried to facilitate co-parenting. It is the father who has engaged in dysfunctional parenting for the last year." Parenting Plan 3.13.5.

Dimitri assigns error to this provision. He claims that it impermissibly restricts him, but not Vicki, from seeking modification of the plan. We disagree. Dimitri may seek modification of the provision for mutual decision making if he can show a statutory basis for doing so. Rather than restricting future modification, this provision designates Vicki as the parent who may seek permission to exercise sole decision-making authority if joint decision-making becomes too conflicted, without having to show a substantial change of circumstances. In effect, the plan makes Vicki the sole decisionmaker, but gives Dimitri one year to demonstrate that he can share decision-making authority with Vicki without engaging her in abusive conflict. If he cannot, Vicki may ask the court to go to the fallback position where she is the sole decisionmaker. Since the court would have been within its discretion to make Vicki the sole decisionmaker from the beginning based on the finding of abusive use of conflict, it was not an abuse of discretion to make that the fallback position.

We conclude the court did not abuse its discretion in finding an abusive use of conflict and using that finding as the basis for the provisions in the plan that promote coparenting and peaceful transitions for the children from one

household to the other.

CHANGE IN PRIMARY RESIDENCE

Dimitri argues that by ordering a change in the children's primary residence to occur after they completed the school year, the trial court impermissibly modified the parenting plan without a finding of adequate cause and without sufficient evidence to show that the change would be in the children's best interests. He contends it was manifestly unreasonable for the court to make a change in their primary residence a year after trial and such a change should not be allowed to occur without a review hearing.

Vicki initially responds that Dimitri failed to preserve his objection to the phased plan because he did not object when the trial court issued its oral ruling and he did not move for reconsideration of the written parenting plan under CR 59. She cites In re Marriage of Studebaker, 36 Wn. App. 815, 818, 677 P.2d 789 (1984). In that case, the husband argued on appeal that in modifying the decree to require postsecondary educational support for the children, the trial court imposed tax disadvantages that violated a nonmodification provision of the decree. We refused to consider the argument because the father had not "advanced this claim in a substantive fashion at trial." Studebaker, 36 Wn. App. at 818. Vicki contends that if Dimitri had expressed to the trial court the concerns he raises on appeal, the court might have accommodated those concerns by moving the children to Vicki's household immediately or by

requiring a review hearing before the move took place, and the parties might have avoided this expensive appellate litigation.

Vicki's argument makes practical sense, but we cannot say that Dimitri's appeal is outside the bounds of the appellate rules as they have been applied in cases involving appeals from a parenting plan or other decisions involving the welfare of children. See, e.g., In re Marriage of Wendy M., 92 Wn. App. 430, 434, 962 P.2d 130 (1998). At trial Dimitri presented evidence and argument in support of a residential schedule in which he would have been the primary caretaker. We regard this as sufficient to preserve his right to challenge on appeal the different residential schedule chosen by the trial court when it denied his request.

By statute, a trial court may modify a parenting plan only upon a finding of a substantial change of circumstances of the child or nonmoving party. This finding must be based upon "facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan." RCW 26.09.260(1). The statute establishes a strong presumption against modification "because changes in residences are highly disruptive to children." In re Parentage of Schroeder, 106 Wn. App. 343, 350, 22 P.3d 1280 (2001).

But the provision that shifts the children's primary residence to Vicki's household after a year is not a modification of any prior decree or plan. It is a part of the initial parenting plan. A finding of a substantial change of

circumstances is not necessary to justify phasing in a residential schedule as part of the initial parenting plan. We therefore reject Dimitri's argument that the parenting plan violates RCW 26.09.260(1). His contention that the trial court has unfairly limited his ability to seek to modify the parenting plan in the future is also not well taken. He is not prevented from seeking a modification of the residential schedule if circumstances change and he can meet the statutory requirements.

The trial court entered unchallenged findings explaining its decision to allow the children to remain with Dimitri through the coming school year. The court noted that the children were surprised by the separation of their parents. Even after Vicki moved to Mukilteo, the children had not absorbed "the reality of a major change in their lives" and they both wanted more time before being placed with the mother and her fiancé. Because both children had one more year in their current schools on Bainbridge, the court found that a logical transition date for them to start in the Mukilteo School District would be September 2009, when they would be in new and unfamiliar schools anyway. Also, the children "are now seeing a counselor on Bainbridge Island to finally address their adjustment to the divorce of their parents. It would be an untimely interruption to move them to Mukilteo until the next year." Parenting Plan 3.2.10 ("School Schedule").

Dimitri argues that even if the planned change in residential placement is

part of the initial parenting plan rather than a modification, it nevertheless is impermissible because the court assumed "without any evidence" that a residential change a year after trial would be in the children's best interests. He contends the trial court should have built in a review hearing at the end of the first year, as was done in the parenting plan we upheld in In re Marriage of Possinger, 105 Wn. App. 326, 19 P.3d 1109, review denied, 145 Wn.2d 1008 (2001).

In Possinger, the child had not yet reached school age at the time of trial and the parents were contemplating transitions in their work schedules and living arrangements. The trial court ordered that for one year the parties would continue under the terms of their interim plan, with the child residing with the father most of the time. Before the child entered first grade, there would be a review hearing, preceded by mediation, to determine a primary residential schedule on a more permanent basis. No presumption in favor of the father would arise from the interim plan. A year later, after the review hearing, the court awarded primary residential care to the mother. Upon the father's appeal, we held that it was within the trial court's authority to postpone making final parenting decisions at the time of entry of a final decree, even though the pertinent act does not expressly authorize an "interim" parenting plan. We noted, however, that in most cases it is preferable that a detailed permanent parenting plan be entered at the time of final decree to ensure "finality of the

parenting plan and residential continuity." Possinger, 105 Wn. App. at 337.

Unlike in Possinger, in this case the parenting plan is final, not "interim." It sets forth a definite and predictable long-term residential schedule for the children. The fact that the Possinger parenting plan required a review hearing after the interim plan came to an end does not mean there must be a review hearing in every parenting plan at the point where one residential schedule ends and a new one begins. The trial court in Possinger required a review hearing because at the end of the trial the court had insufficient information on which to base a decision that the parties' interim schedule, which was working well at the time, would continue to serve the best interest of the child over the long term. Here, on the other hand, the court decided it did have sufficient information to justify establishing a parenting plan with a built-in change of residential schedule after one year. The court decided it was in the best interests of the Balashov children to live with their mother long term, but also in their best interests to finish at their respective schools and receive further counseling before making the transition to her new household. Such a determination is within the court's discretion and in this case was based on tenable grounds.

FINDING CONCERNING SEXUAL ORIENTATION

Dimitri assigns error to a finding made by the court in connection with the decision to change the caretaker after one year. The finding concerns Dimitri's fairly recent realization that he is gay. Vicki testified at trial that Dimitri disclosed

to her in 2006 that he was gay and this was a factor in her decision to separate from him. Dimitri testified that he had decided to work with a counselor to determine how and when to address his sexual orientation with his children.

The court's finding states, "The father has been personally dealing with issues of his sexual orientation, and is in counseling with respect to these issues. He has not disclosed these issues to the children or to his mother as of the date of trial. These issues may affect his relationships and his choice of living locations, and more will be known in the next year." Parenting Plan 3.2.8. Dimitri contends this finding reflects an unfair judgment that his homosexuality made him unstable and an unfounded concern that it would have a harmful effect on his relationships with his children. He argues that the court impermissibly decided residential placement on the basis of his sexual orientation. He relies on Cabalquinto, 100 Wn.2d at 329, and In re Marriage of Wicklund, 84 Wn. App. 763, 770, 932 P.2d 652 (1996).

Dimitri reads too much into the finding. This is not a case like Cabalquinto, where the trial court expressed negative beliefs about homosexuality. And it is not like Wicklund, where the trial court ordered the father not to engage in any acts of affection with his partner in front of the children. The challenged finding is one of ten in the section establishing the basis for the phased residential plan. Most of the other findings address the difficulties the children were having in adjusting to the events of the dissolution. Several pertain to the transitional nature of Dimitri's

and Vicki's circumstances at the time of trial. The court did not find that Dimitri's sexual orientation would be harmful to his relationships with his children but simply noted it as a factor that "*may* affect" his relationships in general. (Emphasis added.) This modest finding is supported by the fact that Dimitri's mother's reaction is unknown and the tenor of his relationship with her could affect his ability to provide day care for the children. The court's findings detailing the difficulties the children are experiencing in adjusting to Vicki's fiancé show they have discomfort with changes to the relationship between their parents. This finding is in the same vein. Taken together, all the findings about the changes in the parent's lives and the children's adjustment problems support the court's decision to leave the children in Dimitri's care on Bainbridge for one year while they complete counseling and school.

Thus, we agree with Vicki that the most apt precedent is not Cabalquinto or Wicklund but rather In re Marriage of Magnuson, 141 Wn. App. 347, 170 P.3d 65 (2007), review denied, 163 Wn.2d 1050 (2008). In Magnuson, the court upheld a trial court's consideration of the impact of the father's impending transgender transformation in determining primary residence. The court found it appropriate that the trial court focused on the children's current discomfort with the transformation and its unknown future effects, not the father's transgender status per se. Magnuson, 141 Wn. App. at 350. The court concluded that "the need of each child, not Robbie's transgender status, was the court's focus in

determining residential placement." Magnuson, 141 Wn. App. at 352. The same is true here. The court did not consider Dimitri's newly-accepted sexual orientation in a negative light but simply as one of several changes to which the children were going to have to adjust, a process the court intended to facilitate by allowing them to remain in familiar surroundings for a year. We find no abuse of discretion.

RELIGIOUS DECISION-MAKING AUTHORITY

With one exception, the parenting plan provides that major decisions regarding each child—including such matters as education, nonemergency health care, and travel outside the United States—are to be made jointly. The one exception stated in the plan is for religious upbringing. The plan assigns this area of decision-making solely to Vicki: "As to the mother's ability to make sole decisions regarding religious upbringing, the court finds that the father does not have a religion, and the mother has brought the children up in the Orthodox Christian religion without objection from the father." Parenting Plan 4.3. Dimitri challenges this limitation on his decision-making authority and asks that it be stricken from the parenting plan.

To protect parents' respective constitutional rights to the free exercise of religion, Washington courts hold that a parent's decision-making authority with respect to religious upbringing may not be restricted unless there is "a substantial showing of actual or potential harm to the children from exposure to

the parents' conflicting religious beliefs." In re Marriage of Jensen-Branch, 78 Wn. App. 482, 490, 899 P.2d 803 (1995). The court emphasized that "religious beliefs" should be interpreted in the broad sense of "world view" and that a parent's lack of religious belief receives the same amount of protection as any particular religious belief. Jensen-Branch, 78 Wn. App. at 490 n.2.

Here, the trial court made no finding of actual or potential harm that would result from exposing the children to conflicting religious beliefs. Accordingly, we conclude the trial court erred in granting Vicki sole decision-making authority with respect to the religious upbringing of the children. The parenting plan must be amended to give both parties joint authority on the same basis as was done with other major decisions.

CONCLUSION

A trial court must strive to adopt a parenting arrangement that "best maintains a child's emotional growth, health and stability, and physical care." RCW 26.09.002. The parenting plan here, reviewed in the context of the broad discretion that a trial court may exercise, satisfies that statutory objective. With the exception of the provision concerning religious upbringing, we affirm the parenting plan. Vicki requests an award of attorney fees on the basis that the appeal is frivolous. We do not find the appeal to be frivolous and consequently deny the request.

Reversed in part.

Becker, J.

WE CONCUR:

Schindler, C.J.

Grosse, J.